Supreme Court, U.S.
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No. 91-1331

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PIPEFITTER'S ASSOCIATION LOCAL UNION NO. 597,

Petitioner,

v.

FRANK DANIELS,

Respondent.

Petition for Writ of Certiorari
To The United States Court
of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN L. STAINTHORP
People's Law Office
1180 N. Milwaukee
Chicago, IL 60622
312/235-0070

ROBIN POTTER
Potter & Schaffner
343 S. Dearborn, #1210
Chicago, IL 60604
312/341-1810

Attorneys for Petitioner

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent submits this statement in accordance with Sup. Ct. R. 15(1) to correct inaccuracies and omissions in the Statement of the Case by the petitioner. Specifically, petitioner fails to acknowledge in either its statement of the case or its argument that it consented to both the jury instruction to which it now objects and the general verdict which it now posits as its sole ground for relief. Furthermore, petitioner fails to point out that there is a wholly distinct ground for its liability in this matter, judgment under Title VII, which it has not asked this court to review and which would sustain the verdict for the respondent even if this court were to grant certiorari on the question presented for review.

Respondent Frank Daniels, a black pipefitter and welder, sued petitioner Pipefitters Association Local Union No. 597 (L.597), under 42 U.S.C. §1981 (§1981), 29 U.S.C. §185 (§301) and 42 U.S.C. §2000e-2 (Title VII), charging race discrimination and retaliation in denying him job referrals and expelling him from the union. On June 21, 1988, the case proceeded to trial, before a jury on the §1981 and §301 damage claims and before the court on the Title VII and §301 equitable claims. On July 6, 1988, the jury returned a general verdict in favor of the plaintiff, awarding $181,063.50 in compensatory and $150,000.00 in punitive damages. The court subsequently denied defendant's post trial motions, entered judgment against defendant on the Title

VII claims,[1] and awarded attorneys' fees and costs.

The evidence at trial established that Daniels was a qualified and competent pipefitter and welder who actively sought employment. Tr. 616, 683, 792, 299, 1363. Daniels became a full member of petitioner L.597 in 1973 and remained a member until he was expelled in 1984. App. p. 4; Tr. 1296-97. Since a fitter or welder had to be member of L.597 in order for a contractor to hire him this expulsion prevented Daniels from plying his trade. App. p. 4-5. During his membership in L.597 plaintiff was a constant critic of its racial practices and filed numerous

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[1]The judgment ordered further proceedings with respect to injunctive relief and appointed a special master to oversee implementation of a non-discriminatory job referral system, but entered a Rule 54 certification and directed entry of final judgment as to the balance of the judgment.

complaints against it, including charges with the National Labor Relations Board, the Illinois Fair Employment Practices Commission, the Illinios Department of Human Rights, and the Equal Employment Opportunity Commission. App. p. 4.

Petitioner L.597 is the exclusive bargaining agent for pipefitters and welders in northern Illinois and Indiana and had entered into a collective bargaining agreement wherein employers were obligated to hire only L.597 members. The contract also provided that employers were to notify the union of employment opportunities and that the union would refer qualified applicants. App. p. 4; Pl Ex. 11, Art. X §2, §3(a)(b). The contract barred L.597 from discriminating in referrals on the basis of the applicant's race, color, national origin, creed or sex. App. p. 4; Pl. Ex. 11, Art. X, §5.

In accordance with the collective bargaining agreement L.597 established a job referral hall which was an important source of jobs for its members. The largest contractor in the area, Philips and Getschow, which at times employed as many as one third of the members of L.597, hired only workers referred from the hall. Tr. 303-04. L.597 would refer only the number of workers requested, so a referral ensured a job. Tr. 297.

Before this court, and the Court of Appeals, L.597 attempts to misrepresent the evidence in the case and downplay the importance of the referral system. Pet. p. 2-3. The Court of appeals rejected this misrepresentation, finding that the referral system was "an important source of jobs" (App. p. 5), "an indispensable step in a union member's efforts to obtain a position" (App. p. 12), "the primary

mechanism through which contractors hired union employees pursuant to the Area Agreement," (App. p. 12) and noting that "in essence no referral meant no job and no opportunity for union members to enter into employment contracts with employers." App. p. 12. The Court of Appeals further held that "For blacks, the referral system was particularly critical, for the promise of non-discriminatory job referrals as guaranteed by the collective bargaining agreement meant that employers could not choose employees on the basis of race. An unbiased referral system would have assisted black union members in overcoming the racism they might have faced were they required to apply for positions on their own. Moreover, a referral system free of discrimination's taint would open additional doors of opportunity to blacks who because of their historic exclusion

from the industry, lacked the personal contacts to hear about job openings through other means." App. p. 12; Tr. 735, 641.

The evidence showed that the referral system operated by L.597 denied a fair allocation of jobs to blacks in general and Daniels in particular. Daniels and other witnesses testified that jobs were often secretly dispatched out the back door or over the telephone, even when members were present in the hall waiting for referrals. When jobs were supposed to be assigned on a random basis, by picking names out of a hat, Daniels never got a job. Tr. 1314, 1481-84. On several occasions agents of L.597 signed the plaintiff's unemployment card to indicate no work was available when their dispatch records showed that many jobs were dispatched. App. p. 7; Pl. Ex. 3,4,5, Tr.

837-43, 1353. The evidence showed that L.597 was hostile to Daniels because he was black, Tr. 1301-03, 617-18, and because he had filed numerous race discrimination charges against the union. Tr. 614, 1320-21, 1331, 1336.

Plaintiff also introduced uncontroverted expert testimony that blacks received much fewer job referrals than they should relative to their population in the referral hall. The expert, an assistant professor at the University of Chicago who specialized in quantative methodology and labor force dynamics, examined data from dispatch and manpower records. He concluded that the disparity in referral rates could not have occurred by chance but could be caused by a discriminatory selection mechanism. App. p. 7; Tr. 1238-1259.

In addition to evidence showing

discrimination in the referral system plaintiff also introduced evidence of L.597's long hostility towards blacks. In the early 1970's the union resisted the federal government's attempts to open up the trade to minorities, urging members to demonstrate against blacks coming into the union and then grudgingly telling its members they had to accept blacks because of "big brother government." Tr. 1140, 1144. Though the union entered into a consent decree setting forth specific goals for the increase of black and spanish members these goals were never met and the percentage of black members actually declined. Pl. Ex. 15; Tr. 112-13. In 1983 the head of the union declared to a black man running for union office that L.597 had been a "white man's union." Tr. 810-12. There was also a history of racial slurs, both in general

and directed at the plaintiff. Tr. 1144-50, 1302-03.

In 1984 the union expelled the plaintiff, claiming he had hit a business agent. The evidence showed that the union's expulsion hearing was a sham, presided over by a union officer who had previously called plaintiff a "nigger" and had tried to prevent him from joining the union. Tr. 1300-01. The union claimed that Daniels was proven guilty "beyond a reasonable doubt" despite the fact that he was acquitted of the identical charge by a jury in criminal court and despite the fact that the evidence showed Daniels had acted in self-defense and had caused no injury to the agent. Tr. 1494-97, 401-407. The plaintiff alleged at the hearing that the charges and hearing were further discrimination against him. Tr. 159-161.

At trial the jury was instructed that

it could find liability against the defendant under §1981 either on the ground that L.597 racially discriminated against the plaintiff by refusing him job referrals, interfering with his ability to get work and failing to properly represent him, because he was black, or on the ground that L.597 expelled the plaintiff from the union because he had previously filed charges of race discrimination. L.597 agreed to both §1981 jury instructions including that on retaliation. The jury was also instructed on §301 and to return a general verdict, either for the plaintiff or for the defendant. L.597 agreed to this general verdict and withdrew its special interrogatories. Tr. 1859, 1856. The jury then returned its verdict in favor of the plaintiff.

After further briefing the court

issued its findings on plaintiff's Title VII claims. (App. 39-47) Under Title VII plaintiff had two claims: 1) that L.597 intentionally discriminated against Daniels in failing to refer Daniels for employment; and 2) that the referral system operated by L.597 had a disparate impact on blacks in general and Daniels in particular. Daniels brought no claim under Title VII in regards to his expulsion from the union. The District Court found for the plaintiff on both grounds under Title VII, finding intentional discrimination and disparate impact. App. p.46, par. 8. The court made specific factual findings in support of each ground of liability. App. p.39-44.

The Seventh Circuit Court of Appeals affirmed the judgments under §1981, §301 and Title VII. The court held that

L.597's discriminatory refusal to refer Daniels for jobs deprived him of the ability to enter into contracts with employers and violated the express terms of the collective bargaining agreement, thus violating §1981 as it was reinterpreted in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). App. p. 9-15. The court further held that even though the jury should have been instructed that retaliation must be racially motivated to violate §1981, L.597's discrimination in the formation of contracts and enforcement of the collective bargaining agreement provided independent bases for affirming §1981 liability. App. p. 20. The court then affirmed §301 liability, holding that "the evidence is rife with evidence that the union intentionally discriminated in the operation of its referral system and

intentionally ignored (plaintiff's) many grievances." App. p. 27. The court then affirmed the Title VII judgment under both disparate treatment and disparate impact theories, holding that "Although the district court adopted the jury's findings of fact, it made additional findings of its own sufficient to support liability under a theory of disparate impact." App. p. 30. The court agreed with the District Court that the evidence regarding the statistical disparities in referrals was "concise, very credible, and uncontroverted" App. p. 31, and upheld the finding of the District Court that "Daniels was subjected to discrimination by the Business Agents responsible for referrals" and that L.597 was thus liable for racial harassment under Title VII. App. p. 32.

L.597's Petition for Rehearing and

Suggestion for Rehearing en Banc was denied and L.597 has now petitioned for certiorari, presenting as the sole question the appropriate course of action for a reviewing court when it affirms liability on several theories but finds error as to one.

SUMMARY OF ARGUMENT

Review should be denied because the verdict against L.597 under Title VII is an independent ground for liability which would be unaffected even if this court were to grant the Petition for Certiorari; and because L.597 waived all objections to the retaliation jury instruction and general verdict to which it now objects.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

THE PETITION FOR CERTIORARI DOES NOT AFFECT THE TITLE VII JUDGMENT WHICH IS A WHOLLY INDEPENDENT GROUND FOR THE PLAINTIFF'S VERDICT

Because the respondent won on his Title VII claims of disparate treatment and disparate impact, and because the Petition for Certiorari raises no challenge to that judgment, this court should decline to review the case since even if the petitioner were successful there are independent grounds to sustain the liability verdict in favor of the respondent.

The trial judge made comprehensive findings of fact and conclusions of law upholding respondent's Title VII claim under disparate treatment and disparate impact theories. On appeal to the Seventh

Circuit L.597 challenged those findings, claiming that the District Court erred because, it claimed, the judge did not make independent findings of fact but relied on the jury's verdict. The Court of Appeals rejected this argument, adhering to the "well settled" rule that "a jury's verdict, when §1981 and Title VII claims are tried simultaneously, binds the judge on factual issues common to both claims." App. p. 29. The Court of Appeals also held that the District Court "made additional findings of its own sufficient to support liability under a theory of disparate impact" App. p. 30, and "made findings sufficient to sustain Daniels' claim of racial harassment due to a hostile work environment under Title VII." App. p. 31. Petitioner L.597 has not asked this court to review these holdings and therefore the Title VII

judgment of liability is now final.

It is basic that this court will decide only "cases" and "controversies," United States Constitution Article III, and will not issue advisory opinions. Chicago and Southern Airlines v. Waterman S.S. Corporation, 333 U.S. 103 (1948). Here, there is no longer any case or controversy concerning L.597's liability for discriminating against Daniels. The case is over and Daniels has prevailed, at least under Title VII. Though reversal of the original §1981 verdict might affect the amount of damages recovered by Daniels[2] it will not affect its substantial liability for lost wages and attorneys' fees.

Review of this case in its present

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[2]Daniels was awarded punitive damages and damages for pain and suffering, which are not available under Title VII, as well as damages for backpay.

posture would thus be an unwise use of substantial judicial resources that would not affect L.597's liability, and for this reason review on certiorari should be denied.

2.

PETITIONER WAIVED ITS OBJECTION TO THE JURY INSTRUCTION ON RETALIATION

Because the Petition for Certiorari is wholly dependent on a holding that the jury was wrongly instructed on respondent's retaliation claim, and because petitioner waived this issue by failing to object to that instruction, review on certiorari should be denied.

At trial Petitioner agreed that the jury should be instructed to return a §1981 verdict for Daniels if he proved that L.597 expelled him in retaliation for filing prior charges of race

discrimination. This was a change of strategy by L.597. Prior to trial petitioner had indicated it would try to have the retaliation claim dismissed, arguing in its trial brief that "discharge of an employee for bringing charges under Title VII is not a violation of §1981," R.82, p. 12, and listing as authority an unreversed and frequently cited decision from the district in which the trial was held, Tramble v. Converters Ink Co., 343 F. Supp. 1350 (N.D. Ill. 1972). At trial petitioner abandoned this defense and agreed to have the retaliation claim, and thus evidence that Daniels had been involved in a physical fight with a Business Agent, heard by the jury.

At the time of the trial of this matter it was an open question whether retaliation could constitute a claim under §1981 and, if so, what the contours of

that potential liability were. Three members of this court had recognized that the issue was undecided in Novack Inv. Co. v. Setser, 454 U.S. 1064, 1065 n.1 (1981) (White, J., joined by Brennan and Marshall JJ., dissenting from Court's denial of certiorari and declining to review "at this time" whether retaliation could be a §1981 violation). The Seventh Circuit Court of Appeals had upheld a verdict based in part on retaliation, but the parties in that case had not contested the viability of that claim. Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1420 (7th Cir. 1986); Malhotra v. Cotter and Co., 885 F.2d 1305, 1313 (7th Cir. 1989).

In addition, in 1986 this court in Goodman v. Lukens Steel Co., 482 U.S. 656 discussed whether racial animus was necessary to find §1981 liability. The majority held it was not, holding that a

union's failure to process discrimination claims violated §1981 "regardless of whether, as a subjective matter, its leaders were favorably disposed towards minorities." 482 U.S. at 669. Three justices dissented on this issue, arguing that §1981 liability always necessitated a showing of intentional race discrimination. The dissenters' arguments would have provided support for L.597 if it had chosen to present its arguments on retaliation to the District Court; if intentional race discrimination were necessary to find liability for failure to process grievances then it should also be necessary to find liability for expulsion from a union and violation of a collective bargaining agreement.[3]

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[3]Conversely, of course, the majority opinion in Goodman supports respondent's argument that retaliation per se, without additional proof of racial animus, is a

Moreover, at the time of trial this court had already enlarged its scope of review in Patterson to include the question:

> Whether or not the interpretation of 42 U.S.C. §1981 adopted by the court in Runyon v. McCray, 427 U.S. 160 (1976), should be reconsidered?

108 S. Ct. 1419 (April 28, 1988). This order, and the fierce dissent it provoked, 108 S. Ct. at 1421-23, demonstrated that this court might reconsider and drastically limit the scope of §1981. The order for reargument in Patterson made it reasonable to anticipate that this Court might hold §1981 inapplicable to retaliation claims and gave the defendant "plenty of time in which to mount a timely challenge to the applicability of §1981."

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§1981 violation. In the event this court accepts this case for review respondent will develop this issue further.

McKnight v. General Motors Corp., 908 F.2d 104, 108 (7th Cir. 1990) Thus, petitioner had ample notice that a legal challenge to plaintiff's retaliation claim might be successful.

Petitioner decided not to pursue that challenge, apparently calculating that the jury would not favor a plaintiff who, it claimed, started a fight. Evidently the strategy backfired and the jury was more impressed with the blatant unfairness and pretextual nature of the union's show trial than with the fleeting contact between Daniels and the Business Agent. Having made this strategic decision, however, petitioner has clearly waived any possible argument that retaliation is not a valid §1981 claim. Davis v. Consolidated Rail Corp., 810 F.2d 679, 684 (7th Cir. 1987); Abel v. Miller, 824 F.2d 1522, 1535 (7th Cir. 1987).

The Seventh Circuit recognized that L.597 had not objected to the retaliation instruction, as required by Fed. R. Civ. P. 51, but considered the claim anyhow on the basis that there is a narrow exception to the rule where an intervening Supreme Court case changes the law and "Patterson and its progeny have made it more difficult for plaintiffs to bring a successful retaliation claim." App. p. 20. The Seventh Circuit's decision to consider the waived claim was not justified.

Fed. R. Civ. P. 51 performs an important role in forcing parties to be explicit as to the exact nature of their legal claims and the exact nature of the objection to those claims. Any objection that is not "distinctly" made is, by the express terms of the Rule, abandoned.

Thus, the rule's intent is to prevent

a party from adopting one legal strategy at trial and a contrary one on appeal. Its strict application forces a party to make final decisions about what legal issues it wishes to contest and those which it prefers to remain in the case. The rule protects the parties and the legal system against the cost and energy involved in numerous re-trials and fixes the attention of the litigants on the importance of a properly instructed jury. Monsma v. Central Mutual Insurance Co., 392 F.2d 49 (9th Cir. 1968); Johnson v. Houser, 704 F.2d 1049 (8th Cir. 1983).

Here, the requirements of Fed. R. Civ. P. 51 should not be waived because Patterson did not work any unforeseen change in §1981 retaliation law and may well have worked no change at all. Patterson undoubtedly changed §1981 law by restricting it to discrimination in the

making and enforcement of contracts, but it did not discuss what mental state was necessary for a defendant to be found liable and did not discuss retaliation. Certainly the reasoning of Goodman v. Lukens Steel Co., 482 U.S. 656, a case cited with approval by the Patterson court, would support the viability of retaliation claims where there is intentional retaliation for bringing discrimination claims but no separate intentional race discrimination. See supra, p. 23-24; Malhotra v. Cotter and Co., 885 F.2d 1305, 1314 (7th Cir. 1989) (Judge Cudahy dissenting).

Moreover, even before Patterson the status of §1981 retaliation claims was unclear. In the absence of any controlling authority allowing such claims L.597 had sufficient grounds to mount a legal challenge if it had wished to do so.

At the time of trial in 1988 §1981 did not explicitly bar retaliation[4] and this court had already indicated it intended to reexamine what many considered the most basic tenets of §1981 law. Any competent attorney with a passing familiarity with employment discrimination law would recognize that the field was open for a challenge to retaliation claims. But L.597 made no such challenge.

Thus, whether or not retaliation per se was a §1981 violation in 1988 is a moot point. L.597 conceded that was and that concession should bind it now. Because petitioner previously waived this issue which is at the heart of its Petition for Certiorari this court should deny review.

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[4]Now it does. See Civil Rights Act of 1991, 42 U.S.C. §2000e-5(k) and 42 U.S.C. §1988.

3.

PETITIONER WAIVED OBJECTION TO THE GENERAL VERDICT

This court should deny review because the Petition waived all objections to the general verdict.

In order to preserve an objection to a form of verdict a party must object at trial. Fed. R. Civ. P. 51; Arnott v. American Oil Co., 609 F.2d 873, 889 (8th Cir. 1989) ("The failure...to make objection to the general verdict form results in a waiver of such objections on appeal"); Corriz v. Naranjo, 667 F.2d 892 (10th Cir. 1981) ("The party who takes exception to the form of the verdict should make objection. He owes that to the court." at 902 (concurring opinion)); Young v. Taylor, 466 F.2d 1329 (10th Cir. 1972).

Here, petitioner consented to the general verdict form and withdrew its previously propounded special interrogatories which would have had the jury differentiate between theories of recovery. The Petitioner thereby waived all objections to the general verdict. In each case cited by the petitioner where a general verdict was upset (Petition pp. 7-8) there is either no discussion of waiver or the party specifically objected to the form of the verdict. Sunkist Growers Inc. v. Winckler and Smith Citrus Products Co., 370 U.S. 19 (1962) (court specifically found no waiver where defendant objected to all contested jury instructions); Murphy v. United States, 653 F.2d 637, 652 fn. 71 (D.C. Cir. 1981); Kassel v. Gannett Co., 875 F.2d 935, 950 (1st Cir. 1989); Garden v. Westinghouse Electric Corp., 850 F.2d 996 (3rd Cir.

1988) (erroneous admission of evidence objected to at trial); Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734 (5th Cir. 1980). Petitioner has not cited a single case where a party who has clearly agreed to a general verdict at trial has succeeded in avoiding that agreement on appeal.

Petitioner had the opportunity at trial to request a different form of verdict. It failed to make that request but rather consented to the general verdict form. It should not now be allowed to withdraw that consent.

CONCLUSION

This Court should decline to review this case because the petitioner will remain liable for race discrimination under Title VII whether or not this court grants review, and because the petitioner agreed to the jury instructions on retaliation and verdict to which it now objects and has thus waived these issues.

Respectfully submitted,

JOHN L. STAINTHORP
People's Law Office
1180 N. Milwaukee
Chicago, IL 60622
312/235-0070

ROBIN POTTER
Potter & Schaffner
343 S. Dearborn
Suite 1210
Chicago, IL 60604
312/341-1810